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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/913,377	11/13/2001	Joerg Schwarzer	H3876PCT/US	9537
23657	7590	01/13/2005	EXAMINER	
COGNIS CORPORATION			BADIO, BARBARA P	
PATENT DEPARTMENT			ART UNIT	PAPER NUMBER
300 BROOKSIDE AVENUE			1616	
AMBLER, PA 19002				

DATE MAILED: 01/13/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Applicant No.</b>	<b>Applicant(s)</b>	
	09/913,377	SCHWARZER ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Barbara P. Badio, Ph.D.	1616	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE \_\_\_\_ MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on \_\_\_\_.
- 2a) This action is FINAL.                            2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) \_\_\_\_ is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_ is/are allowed.
- 6) Claim(s) \_\_\_\_ is/are rejected.
- 7) Claim(s) \_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a) All    b) Some \* c) None of:
    1. Certified copies of the priority documents have been received.
    2. Certified copies of the priority documents have been received in Application No. \_\_\_\_.
    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) <input type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date. ____
3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date ____.	5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)
	6) <input type="checkbox"/> Other: ____.

**Nonfinal Office Action on the Merits**

1. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

***Claim Rejections - 35 USC § 102***

2. **The rejection of claims 35 and 36 under 35 USC 102(b) over Amer (US 4,963,346) is withdrawn.**

3. Claims 35-37 are rejected under 35 U.S.C. 102(b) as being anticipated by Lamminkari et al. (US 4,153,622).

Lamminkari et al. teach phytosterol compositions comprising  $\beta$ -sitosterol, campesterol and  $\alpha$ -sitosterol that are substantially free of other phytosterols including citrostadienol (see the entire article, especially Examples 13, 5, 8-12). The compositions taught by the reference are encompassed by the instant claims.

4. Claims 35-37 are rejected under 35 U.S.C. 102(b) as being anticipated by Koskenniska (US 4,298,539).

Koskenniska teaches phytosterol compositions comprising  $\beta$ -sitosterol, campesterol and  $\alpha$ -sitosterol that are substantially free of other phytosterols including citrostadienol (see the entire article, especially Examples 1-7). The compositions taught by the reference are encompassed by the instant claims.

***Claim Rejections - 35 USC § 103***

5. The rejection of claims 35-37 under 35 USC 103(a) over Amer (US 4,963,346) is withdrawn.

***Response to Arguments***

6. Applicant's argument that the rejected embodiments of the claimed invention are directed to products prepared by the processes according to claims 9 and 34, respectively, wherein a major portion of the product comprises a phytosterol is noted. However, MPEP § 2113 states that the determination of patentability is based on the product itself and, thus, if the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process.

***Telephone Inquiry***

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Barbara P. Radio, Ph.D. whose telephone number is 571-272-0609. The examiner can normally be reached on M-F from 6:30am-4:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gary L. Kunz can be reached on 571-272-0887. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Art Unit: 1616

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Barbara P. Badio  
Primary Examiner  
Art Unit 1616

BB  
January 12, 2005